Supreme Court, U.S.
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No. 91-1947

In The

Supreme Court of the United States

October Term, 1991

DEAN A. FIRTION,

Petitioner,

v.

MARK HEBERT and RODNEY FOREY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT FOREY'S BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

Respondent does not agree that the questions framed by Petitioner are presented by this record:

A. There is no suggestion in the Court of Appeals' summary order that the Court did not view the evidence in the light most favorable to Petitioner in deciding Respondents were entitled to qualified immunity as a matter of law.

B. Under the rules in effect at the time of trial, the trial court's initial denial of the motion for directed verdict has no presumptive weight; instead, the "court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

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JURISDICTION

This action was originally commenced by the Petitioner in the United States District Court for the District of Vermont. Jurisdiction there was founded on 28 U.S.C. § 1332 and § 1343. Judgment was entered on an April 2, 1991, jury verdict in favor of Respondent Forey. Petitioner timely appealed to the Second Circuit Court of Appeals, and the Second Circuit affirmed the judgment of the district court by summary order entered January 23, 1992. Petitioner's Petition for Rehearing was denied by order entered February 27, 1992.

On May 27, 1992, Petitioner filed his Petition for a Writ of Certiorari to the United States Supreme Court. The jurisdiction of this Court to review cases in the courts of appeal by writ of certiorari is granted by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

Fed.R.Civ. 50(b) (1991).

STATEMENT OF THE CASE

This is an action in which the Petitioner claimed an excessive use of force against him by a policeman for the Town of Brattleboro and two Vermont state policemen. After six days of trial, a directed verdict was entered in favor of one of the state policemen and the jury returned a verdict for the remaining officers. The judgment was affirmed by the United States Court of Appeals for the Second Circuit. Petitioner seeks review by Writ of Certiorari. The issue presented is whether the Court of Appeals had authority to determine that Respondent Forey was entitled to qualified immunity.

Facts

Respondent Rodney Forey, then a trooper with the Vermont State Police, was called to assist the Brattleboro Police Department at a disturbance at the Red Coach Inn in Brattleboro, Vermont.

Prior to Trooper Forey's arrival, the Brattleboro police had already entered Petitioner's room, Petitioner had been hit with a flashlight and was wounded and bleeding, the room had been searched, and most of the occupants had obeyed orders to leave or had been arrested.

Trooper Forey escorted the Petitioner out of the motel room and down a flight of stairs. To do so, Trooper Forey testified he placed his right hand behind the Petitioner's left bicep and placed his left hand by the Petitioner's left wrist, an escort maneuver known as "open hand control". At trial, Petitioner claimed Trooper Forey grabbed his

arm, twisted it behind his back, and made the Petitioner run down the stairs.

Petitioner was not arrested. Once outside the motel room, Petitioner refused an ambulance which had been called for him, and Trooper Forey went to his cruiser and got first-aid supplies for the Petitioner. Forey then left the Red Coach Inn at 2:22 a.m., having been at the scene for about twenty (20) minutes.

Over an hour later, there was another disturbance at the Red Coach Inn. At that time the Petitioner was issued a citation by a Brattleboro police officer for disorderly conduct, and another Vermont state trooper transported the Petitioner to the hospital for the cut on his forehead received from a Brattleboro police officer in the earlier incident. Petitioner made no complaint of any physical injury or discomfort other than that cut while at the hospital.

Proceedings Below

During trial, Respondent moved for directed verdict on grounds of qualified immunity. The verdict in his favor obviated the need for the trial court to make final determination of the legal questions raised by the motion. Fed.R.Civ.P. 50(b) (1991).

On appeal, Respondent argued that judgment should be affirmed because he was entitled to directed verdict on the issue of immunity. The court of appeals agreed.

In a summary order, the court ruled Respondent was entitled to qualified immunity as a matter of law:

> "Government officials performing discretionary functions are immune from civil liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The test is an objective one, and the relevant inquiry is whether 'a reasonable officer could have believed [the official action] to be lawful, in light of clearly established law and the information . . . possessed' by the officer at the time the action was taken. *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). Because it was objectively reasonable for appellees to believe that their actions did not violate appellant's clearly established rights, *Robison v. Via,* 821 F.2d 913, 921 (2d Cir. 1987), appellees are entitled to qualified immunity as a matter of law."
>
> (A2-A3.)

SUMMARY OF ARGUMENT

This Court should not grant certiorari merely for the purpose of determining whether Petitioner has received proper appellate review.

The hypotheses presented by Petitioner are cloaked in misplaced speculation and conjecture which attempt to discredit the appellate court's affirmance and ruling that Respondents were entitled to qualified immunity as a matter of law. The lower court may affirm on any basis for which there is support in the record, and recourse to the speculation upon which the Petitioner relies is without basis.

ARGUMENT

THE PETITION RAISES NO SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI.

A review on writ of certiorari will be granted only when there are "special and important reasons therefor." Sup. Ct. R. 10.1. The decision below represents the routine appellate work of the court of appeals. The court of appeals reviewed an extensive record and determined Trooper Forey was entitled to qualified immunity as a matter of law. Petitioner is here seeking a second level of appellate review. But this is not and cannot be the current function of the writ of certiorari. Petitioner has advanced no "special or important" reason for this Court to become involved with this case.

This case does not present a conflict among the courts of appeals. It is well-settled law that an appellate court may affirm on any basis for which there is support in the record. *See, e.g., Scivally v. Time Ins. Co.*, 724 F.2d 101, 103 (2d Cir. 1983); *Fairview Township, Pennsylvania v. United States Environmental Protection Agency*, 773 F.2d 517 (3d Cir. 1985); *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986); *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226 (Fed. Cir.), *cert. denied*, 493 U.S. 853, 107 L.Ed.2d 112 (1989); *United States v. One Lot of U.S. Currency ($68,000)*, 927 F.2d 30 (1st Cir. 1991); *SIDCO Products Marketing, Inc. v. Gulf Oil Corp.*, 858 F.2d 1095 (5th Cir. 1988); *United States v. Anderson County, Tenn.*, 761 F.2d 1169 (6th Cir.), *cert. denied*, 474 U.S. 9191, 88 L.Ed.2d 256 (1985); *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683 (7th Cir. 1991); *Nichols v. City of St. Louis*, 837 F.2d 833 (8th Cir. 1988); *Jackson v. Southern California Gas Co.*, 881 F.2d 638 (9th Cir. 1989); *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990).

Petitioner's hypotheses concerning the reasoning of the Second Circuit Court of Appeals are without merit. *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990), teaches that even if there is a basis for a jury to find constitutionally excessive force was used against a person, "it is for the district judge to determine whether the unlawfulness of the [alleged] conduct should have been apparent to [the officer] at the time." *Finnegan*, 915 F.2d at 823-24. *See Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam). Thus, the district court judge in the first instance, and the court of appeals on review, must determine whether or not the officers are entitled to qualified immunity as a matter of law.

Respondent argued in the court of appeals that, even accepting Plaintiff's evidence, it was objectively reasonable for Trooper Forey to believe no constitutionally excessive force was used:

> "Viewing the evidence in the light most favorable to the Plaintiff – if Lieutenant Forey did what Plaintiff claims he did – it was still objectively reasonable for Lieutenant Forey to believe he was acting in a fashion that did not violate Plaintiff's (then) clearly established right to be free from force that 'shocked the conscience.'
>
> . . .
>
> There is no evidence of bad faith or malice. To the contrary, Lieutenant Forey personally went out of his way to get medical help for Plaintiff. When it was refused, he removed Plaintiff from the scene without any injury. If the force used caused some temporary hurt – even if the force used could by some stretch of

> the imagination have been found to be more than objectively reasonable – ('he grabbed [my arm] and twisted it and made me run down the stairs . . . '), the force allegedly used is not so excessive under the circumstances and so obviously unconstitutional under the (then) clearly established 'shock-the-conscience' standard of *Johnson v. Glick* that no reasonable law enforcement officer could have believed his actions were proper."
>
> (Brief of Defendant-Appellee Rodey Forey at 7, 8.)

In the court of appeals' ruling that "it was objectively reasonable for appellees to believe that their actions did not violate appellant's clearly established rights," (A3) there is absolutely no suggestion that the court did not view the evidence in the light most favorable to Petitioner. The first question raised in the Petition is simply not presented by this record.

Petitioner's second contention, that the appellate court must have erred even if it viewed the facts in the light most favorable to the Petitioner because it differed from the trial court's decision regarding the directed verdict motions, is also without basis. Under the rules in effect at the time of trial, the trial court's initial denial of the motion for directed verdict has no presumptive weight. Instead, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Fed.R.Civ.P. 50(b) (1991). The district court's later review was obviated by the jury verdict and, under familiar principles discussed above, the court of appeals was entitled to affirm on the basis that Respondents were entitled to

qualified immunity as a matter of law. In determining whether a verdict should have been directed, the appellate court applies the same standard as does the trial court in passing on the motion originally. Litigants are entitled to full review of legal issues by the appellate court without special deference to the views of the trial court. 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2536 at 595 (1971).

This Court should not grant certiorari merely for the purpose of determining whether Petitioner has received proper appellate review. The Petition raises no special or important reason for granting certiorari.

CONCLUSION

The court of appeals had authority, taking the evidence in the light most favorable to Petitioner, to determine Respondents are entitled to qualified immunity as a matter of law because it was objectively reasonable for Respondents to believe that their actions did not violate Petitioner's clearly established rights. This case does not present the questions framed by Petitioner, nor does it present any special or important issue appropriate for this Court's review.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be DENIED.

Respectfully submitted,

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